

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

EMMETT WESSON,

Petitioner,

vs.

TERESA HUNT,

Respondent.

NO. CV-05-5057-CI

ORDER ADOPTING REPORT AND
RECOMMENDATION IN PART AND
DIRECTING PETITIONER TO SHOW CAUSE

BEFORE THE COURT are Petitioner's "Objections to Magistrate Judge's Report and Recommendation and/or in the Alternative Motion to Convert the Instant Action from 28 U.S.C. § 2241 to Action Under 28 U.S.C. § 2255 Under Protest" (Ct. Rec. 5). Petitioner, a federal prisoner at FCI Safford, Arizona, is proceeding *pro se*; Respondent has not been served.

After review of the Report and Recommendation and consideration of Petitioner's Objections, the court finds Petitioner has failed to demonstrate 28 U.S.C. § 2255 is an inadequate or ineffective means for presenting his claim. Indeed, Petitioner indicates he has not filed a previous motion under § 2255 and asserts he has until January 12, 2006, to file his claims.

Petitioner has requested, under protest, that the court convert his § 2241 petition into a motion under § 2255. Because Petitioner is

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1 proceeding *pro se* and this would apparently be his first 28 U.S.C. §
2 2255 motion, the court must give Mr. Wesson certain warnings before
3 "re-characterizing" his petition as a motion under § 2255. See *Castro*
4 *v. United States*, 540 U.S. 375, 377 (2003).

5 Petitioner is warned a re-characterization would mean that any
6 subsequent § 2255 motion would be subject to the restrictions on
7 "second or successive" motions. See § 2255, ¶ 8. Therefore, if Mr.
8 Wesson chooses to proceed with this action as one under § 2255, his
9 motion must contain all the § 2255 claims he believes he has.

10 The court finds the magistrate judge's report of the law to
11 Petitioner's facts to be accurate, despite Mr. Wesson's assertions to
12 the contrary. Therefore, **IT IS ORDERED** the Report and Recommendation
13 is **ADOPTED**. The court, however, will reserve ruling on the proposed
14 dismissal to enable Mr. Wesson the opportunity to **SHOW CAUSE** why his
15 present petition should proceed as his first § 2255 motion. Failure
16 to do so within **THIRTY (30) DAYS** of the date of this Order will result
17 in dismissal of the petition without prejudice as previously
18 recommended. The court will address Petitioner's timeliness questions
19 as decidable situations arise.

20 **IT IS SO ORDERED.** The District Court Executive is directed to
21 enter this Order, forward a copy to Petitioner, and SET A CASE
22 MANAGEMENT DEADLINE ACCORDINGLY.

23 **DATED** this 25th day of August, 2005.

24
25 **s/Lonny R. Suko**

26 _____
27 LONNY R. SUKO
28 UNITED STATES DISTRICT JUDGE

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